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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 194

MARY P. FINLAYSON AND D. A. FINLAYSON, HER HUSBAND,

Appellants,

vs.

TOWN OF MONTICELLO, A MUNICIPAL CORPORATION UNDER THE LAWS OF THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

CHAS. S. AUSLEY,
LEROY COLLINS,
LAWRENCE A. TRUETT,
Counsel for Appellee.

INDEX.

Subject Index.

	Page
Appellee's statement opposing jurisdiction and motion to dismiss or affirm	1
The appeal is frivolous	2
There is not presented a substantial federal question	4
It affirmatively appears that the determination by the Supreme Court of Florida that the appellants were estopped from asserting the alleged defense to the foreclosure of the improvement liens sued upon, is a sufficient non-federal ground supporting the decision complained of, and precluding the appeal to the United States Supreme Court on the alleged Federal grounds	6

Table of Cases Cited.

Bass, et al., v. *The Mayor and Alderman of the City of Milledgeville*, 295 U. S. 721, 55 Sup. Ct. 926, 75 L. Ed. 1675	4
Campbell v. *City of Olney*, 262 U. S. 352, 43 Sup. Ct. 559, 67 L. Ed. 1021	5
Cass Farm Company, Ltd., et al., v. *City of Detroit, et al.*, 181 U. S. 399, 21 Sup. Ct. 624, 45 L. Ed. 395	4
Farrell v. *West Chicago Park Comm'rs. Ill.*, 21 Sup. Ct. 609, 181 U. S. 404, 45 L. Ed. 916	5
French v. *Barber Asphalt Pav. Co.*, 21 Sup. Ct. 625, 181 U. S. 324, 45 L. Ed. 879	4
Hibben v. *Smith*, 24 Sup. Ct. 88, 191 U. S. 310, 48 L. Ed. 195	5
Summerland v. *City of Punta Gorda*, 134 So. 611, 101 Fla. 543	5
Theresa McSweeney v. *Equitable Trust Company*, 315 U. S. 785, 62 Sup. Ct. 805, 86 L. Ed. 1191	6

Page

Utley, et al. v. *City of St. Petersburg, Fla.*, 292 U. S. 106, 54 Sup. Ct. 593, 78 L. Ed. 1155 4
Walters, et al., v. *City of Tampa, et al.*, 101 So. 227, 88 Fla. 178 5

STATUTES CITED.

Chapter 9298, Laws of Florida, Acts of 1923 ..... 2, 4
Sections 170.01 et seq. Florida Statutes, 1941 ..... 2, 4
Judicial Code, Title 28, Section 344 3

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APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

Appellee, believing that the matters set forth below will demonstrate the lack of substance in the question raised by this appeal, files this its statement in opposition to appellants' statement as to jurisdiction. Appellee includes herein its motion to dismiss the appeal or in the alternative to affirm the judgment of the Supreme Court of the State of Florida on the grounds that (1) the appeal is frivolous; (b) there is not presented a substantial federal question; (c) it affirmatively appears that the determination by the

Supreme Court of Florida that the appellants were estopped from asserting the alleged defense to the foreclosure of the improvement liens sued upon, is a sufficient nonfederal ground supporting the decision complained of, and precluding the appeal to the United States Supreme Court on the alleged federal grounds.

The matters here relied upon by the appellee are more particularly stated below:

1.

The Appeal Is Frivolous.

The proceeding was initiated by bill of complaint filed by the Town of Monticello, a municipal corporation of Florida in the Circuit Court of Jefferson County, Florida. The relief sought was the foreclosure of alleged special assessment improvement liens arising from three paving programs effected in 1925 and 1926. Authorization for the paving and special assessments against the abutting property owners was bottomed on Chapter 9298, Laws of Florida, Acts of 1923, Sections 170.01 et seq. Florida Statutes, 1941. When issue was joined, the matter was referred to a Special Master with directions to take the evidence and make findings of law and fact. The Special Master found the liens to be valid and subsisting, the obligations secured thereby to be in default, and recommended that upon failure to pay the amount determined to be due, foreclosure be ordered. The defendants filed exceptions to the report and upon a hearing on the same, the Circuit Court dismissed the bill. The plaintiff appealed from this order to the Supreme Court of Florida where a reversal was entered and foreclosure ordered. An appeal to the United States Supreme Court from this order is now sought.

The crux of the appellants' contention to support the appeal is that the record does not disclose any public hear-

ing, *prior to the adoption of the resolution*, by which the improvement in each instance was initiated, for the determination of special benefits. Hence the land owner was denied his privileges secured by the 14th Amendment to the Constitution of the United States. The constitutionality of Chapter 9298, supra, is not assailed. This statute does not require such a hearing. It enumerates the procedure required to effect the liens and does provide a hearing and notice thereof prior to the establishment of the liens. That this hearing was held after due notice, was fully established and was not questioned before the Supreme Court of the State and is not questioned on this appeal. In its decision the Florida Supreme Court expressly determined:

> "Our perusal of the record has convinced us of the propriety of the governing authority in its every action from the inception of the paving program until its accomplishment. The requisite resolutions, plans, specifications, and the like, seem to have been adopted in the manner and at the time required by law, and evidently all provisions for publication of notices and assessment rolls were scrupulously obeyed. The governing authorities, sitting as an equalizing board after due notice of their meeting, considered and determined complaints and made necessary adjustment in assessments. Therefore in the main no defect in the procedure resulting in the liens against the property of appellee has been discovered."

The appellants have not included in the record here the evidence supporting the fact that each step in the statutory proceeding to effect the liens was carefully followed. They do not even challenge the finding by the State Court of this fact, and thereby admit its truth. They seek to assail the validity of the initiating resolution standing alone. They argue that this resolution is in effect a municipal ordinance and therefore a "statute" within the meaning of sub-section (b) of Section 344, Title 28, of the Judicial Code. This

resolution can be given no such effect. It is a component part of a proceeding, comprising many other factors. The validity of the liens, if reviewed, must be considered in the light of the entire proceeding by which they were sought to be established. Hence the appeal sought is without support and is frivolous.

II.

There Is Not Presented a Substantial Federal Question.

The only alleged federal question is a failure by the municipality to have a hearing to determine benefits, and give notice thereof, *prior to the adoption of the initiating resolution.* We reiterate that no such hearing is required by the statute involved and the validity of the statute is not challenged. The statute does require a hearing and notice thereof before final approval of the assessments (Section 7 *et seq* of Chapter 9298, *supra;* Section 170.07 *et seq.*, Florida Statutes, 1941). That this hearing was had as provided is not questioned.

That no substantial federal question is presented is supported by the decision of this Court in a Florida case exactly in point. See:

Utley, et al., v. *City of St. Petersburg, Fla.*, 292 U. S. 106; 54 S. Ct. 593; 78 L. Ed. 1155.

In point also are the following decisions of this Court:

Bass et al., v. *The Mayor and Alderman of the City of Milledgeville*, 295 U. S. 721; 55 S. Ct. 926; 75 L. Ed. 1675.

Cass Farm Company, Ltd., et al., v. *City of Detroit, et al.*, 181 U. S. 399; 21 S. Ct. 624; 45 L. Ed. 395.

French v. *Barber Asphalt Pav. Co.*, 21 S. Ct. 625, 181 U. S. 324, 45 L. Ed. 879.

Farrell v. *West Chicago Park Comm'rs* Ill., 21 S. Ct. 609, 181 U. S. 404, 45 L. Ed. 916.

Hibben v. *Smith*, 24 S. Ct. 88; 191 U. S. 310; 48 L. Ed. 195.

As pointed out in the case of

Campbell v. *City of Olney*, 262 U. S. 352; 43 S. Ct. 559; 67 L. Ed. 1021.

"Plaintiff in error had opportunity to be heard before the City Council and was allowed a reasonable time after the assessment to bring suit to set it aside or to correct it or any proceeding with reference thereto. He failed to avail himself of the rights so given him by State laws. Their validity was not drawn into question. His claim that he was denied due process is not even colorable. (Many cases cited). There is no federal question in the case."

The Supreme Court of Florida has expressly upheld the constitutionality of the act against asserted violation of the due process clause of the State Constitution and the United States Constitution. See:

Summerland v. *City of Punta Gorda*, 134 So. 611, 101 Fla. 543.

Walters et al., v. *City of Tampa, et al.*, 101 So. 227; 88 Fla. 178.

III.

It affirmatively appears that the determination by the Supreme Court of Florida that the appellants were estopped from asserting the alleged defense to the foreclosure of the improvement liens sued upon, is a sufficient nonfederal ground supporting the decision complained of, and precluding the appeal to the United States Supreme Court on the alleged Federal grounds.

The Florida Supreme Court held the appellants to be estopped from asserting the invalidity of the liens. The estoppel was bottomed upon these facts established by the record and not challenged here:

(a) No complaint by owner appellant was made at the hearing;

(b) No steps were taken by owner to vitiate assessments for long period of years;

(c) Appellants recognized and assented to validity of liens in mortgage foreclosure procedure by which title to property was acquired;

(d) Appellants asserted validity of liens in mortgage foreclosure proceeding and made a recovery of financial benefit based upon such validity;

(e) Appellants assented to validity of liens by paying like assesments on other property.

This finding of estoppel, which is not assigned as error here, is sufficient to support the decision of the State Court. It was expressly so held in the case of *Utley et al.*, v. *City of St. Peterburg, Fla., supra.* Or like effect is the decision of this Court in the case of

Theresa McSweeney v. *Equitable Trust Company,* 315 U. S. 785; 62 S. Ct. 805, 86 L. Ed. 1191 (facts shown by report of case from State Court 127 N. J. L. 209; 22 Atl. 2nd 282).

Wherefore, the appellee submits this statement showing the appeal to be frivolous; that the question is not a substantial federal one; and, that the finding of estoppel is sufficient to support the decision of the State Court; and respectfully moves the Court to dismiss the appeal or in the alternative to affirm the decision of the Supreme Court of the State of Florida entered herein.

(s) CHAS. S. AUSLEY.
(s) LEROY COLLINS.
(s) LAWRENCE A. TRUETT.

AUSLEY, COLLINS & TRUETT,
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